Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, *et al.*,

Petitioners,

—v.—

MARIE MANHART, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN COUNCIL OF LIFE INSURANCE ON BEHALF OF PETITIONERS

EDWARD SILVER
LARRY M. LAVINSKY
STEPHEN E. TISMAN
300 Park Avenue
New York, New York 10022
Attorneys for the Amicus

Of Counsel:

PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022

WILLIAM B. HARMAN, JR.
Executive Vice President
American Council of Life Insurance
1850 K Street, N.W.
Washington, D.C. 20006

INDEX

PAGE

Authorities Cited ii

Interest of the Amicus 1

Summary of Argument 2

The Decision Below 4

ARGUMENT:

Distinctions Between Males and Females Based Upon Life Expectancy Are Not Sex-Based Distinctions 6

Title VII Does Not Prohibit Distinctions Between Male and Female Employees Based Upon Life Expectancy 12

A. Traditional Title VII Tests of Sex Discrimination Cannot Meaningfully Be Applied to Insurance and Pension Benefits 12

B. Title VII Does Not Prohibit Distinctions In Insurance and Pension Plans Between Males and Female Employees Based On Valid Actuarial Data 19

C. Differentials Based Upon Life Expectancy Are Permitted Under the Equal Pay Act and Therefore Do Not Violate Title VII 35

IMPLICATIONS OF THE DECISION BELOW 42

CONCLUSION 50

PAGE

Authorities Cited

Cases:

American Federation of Musicians v. *Wittstein*, 379 U.S. 171 (1964) 26

Cohen v. *Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1973), *rev'd on other grounds sub nom. Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974) 29

Commissioner of Internal Revenue v. *Standard Life & Accident Insurance Co.*, —— U.S. ——, 97 S. Ct. 2523 (1977) 2

Dennis v. *United States*, 339 U.S. 162 (1950) 50

Employers Mutual Liability Ins. Co. v. *Arrien*, 244 F. Supp. 110 (N.D.N.Y. 1965) 26

Equal Employment Opportunity Commission v. *Colby College*, Daily Lab Rep. (BNA) No. 212 (Nov. 2, 1977 at D-1) 37, 38

Espinoza v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973) 6, 25, 26, 34

Friedman v. *United States*, 374 F.2d 363 (8th Cir. 1967) 35

Geduldig v. *Aiello*, 417 U.S. 484 (1974) 7, 39, 40

General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) 2, 5, 6, 7, 8, 9, 10, 17, 22, 34, 37, 38, 39, 40, 45

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 5, 15, 16

Hecht v. *Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) 35

PAGE

Inland Steel Co. v. *NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) 39

Ithaca Trust Co. v. *United States*, 279 U.S. 151 (1929) 20

Kettell v. *Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972) 35

Liberty Mutual Insurance Co. v. *Wetzel*, 424 U.S. 737 (1976) 2

Manhart v. *City of Los Angeles, Dep't of Water and Power*, 553 F.2d 581 (9th Cir. 1976), *cert. granted*, 46 U.S.L.W. 3214 (U.S., Oct. 3, 1977) 4, 15, 16, 42

Manhart v. *City of Los Angeles, Dep't of Water and Power*, 387 F. Supp. 980 (C.D. Calif. 1975) 15, 18

Morton v. *Mancari*, 417 U.S. 535 (1974) 26

Morton v. *Ruiz*, 415 U.S. 199 (1974) 34

Ozawa v. *United States*, 260 U.S. 178 (1922) 35

Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) .. 15, 16, 18

Rafford v. *Randle Eastern Ambulance Service, Inc.*, 348 F. Supp. 316 (S.D. Fla. 1972) 29

Ranes v. *Office Employees International Union*, 317 F.2d 915 (7th Cir. 1963) 26

Rosenfeld v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971) 15, 16, 18

Schultz v. *Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970) 22

Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 34

Sprogis v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) 15, 16

PAGE

Toilet Goods Association v. *Finch*, 419 F.2d 21 (2d Cir. 1969) 35

United Housing Foundation, Inc. v. *Forman*, 421 U.S. 837 (1975) 34

Willingham v. *Macon Telegraph Publishing Co.*, 482 F.2d 535 (5th Cir. 1973) 15
Willingham v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (*en banc*) 6, 16, 23

Zachary v. *R.H. Macy & Co.*, 31 N.Y.2d 443 (1972) 35

Statutes:

Civil Rights Act of 1964, Title VII, 78 Stat. 253, *as amended by* the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e *et seq.* .....*passim*
Section 703(h), 42 U.S.C. §2000e-2(h) 5, 22, 23, 35, 36, 38
Section 716(a), 78 Stat. 266 30
Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* (Supp. V 1975) 24
Equal Pay Act, 29 U.S.C. §206 .....*passim*
Equal Pay Act, 29 U.S.C. §206(d) 35, 40
Int. Rev. Code of 1954 §72 24
Ala. Code tit. 51, §432 (1958) 24
Alaska Stat. §43.31.011 (1977) 24
Ariz. Rev. Stat., vol. 18, Table VIII, & Supp., Tables VIII-X (West 1956 & Supp. 1977) 26
Cal. Ins. Code §790.03 (West Supp. 1976) 29
Cal. Lab. Code §1432 (West Supp. 1977) 30
Cal. Rev. & T. Code §13953 (West Supp. 1976) 26
Del. Code tit. 30, §1326 (1974) 24
Del. Code tit. 19, §711(h) (1975) 30

PAGE

D.C. Code Ann. §35-715 29
Fla. Stat. Ann. §198.02 (West 1971) 24
Ga. Code Ann. §92-3401 (1974) 24
Ind. Code Ann. §6-4.1-1-5 (Burns 1976) 24
Iowa Code Ann. §450.51 (West 1971) 26
Iowa Code Ann. §601A.12 (West 1975) 29
Iowa Code Ann. vol. 58 (West Supp. 1977) [tables] 26
Me. Rev. Stat. tit. 5, §4573 (1973 Supp. Pamphlet) 30
Md. Ann. Code art. 81, §160 (Supp. 1976) 24
Mass. Ann. Laws ch. 65, §13 (Michie/Law Co-op Supp. 1976) 24
Mo. Ann. Stat. §296.020 (Vernon Supp. 1976) 29
Mont. Rev. Codes Ann. §64-328 (Supp. 1976) 30
Neb. Rev. Stat. §77-2008 (1976) 24
N.H. Rev. Stat. Ann. §86:11 (Supp. 1975) 24
N.M. Stat. Ann. §72-33-3 (Supp. 1975) 24
N.D. Cent. Code §31-08-05 (1976) 26
N.D. Cent. Code §57-37.1-03 (Supp. 1977) 24
Or. Rev. Stat. §118.150 (1975) 24
Or. Rev. Stat. §659.028 (1975) 29
Pa. Cons. Stat. tit. 43, §955 (Purdon Supp. 1977) 30
S.C. Code §12-15-40 (1976) 24
Tex. Tax Code tit. 20A, §14.08 (1971) 24
Utah Code Ann. §59-12A-3 (1977) 24
Vt. Stat. Ann. Tit. 32, §7442 (1971) 24
Wis. Stat. Ann. §72.28 (West 1972) 24

Standard Valuation Statutes:

Ala., Alaska, Ariz., Ark., Cal., Col., Conn., Del., D.C., Fla., Ga., Haw., Idaho, Ill., Ind., Iowa, Kan., Ky., La., Me., Md., Mass., Mich., Minn., Miss., Mo., Mont., Neb., Nev., N.H., N.J., N.M., N.Y., N.C., N.D., Ohio, Okla., Or., Pa., S.C., S.D., Tenn., Tex., Utah, Vt., Va., Wash., W.Va., Wis., Wyo. 27

PAGE

Non-forfeiture Statutes:

Ala., Alaska, Ariz., Ark., Cal., Col., Del., D.C., Fla., Ga., Haw., Idaho, Ill., Ind., Iowa, Kan., Ky., La., Me., Md., Mass., Mich., Minn., Miss., Mo., Mont., Neb., Nev., N.H., N.J., N.M., N.Y., N.C., N.D., Ohio, Okla., Pa., S.C., S.D., Tenn., Tex., Utah, Vt., Va., Wash., W.Va., Wis., Wyo. 28

Regulations:

29 C.F.R. §800.116(d) 31
29 C.F.R. §1604.8 36
29 C.F.R. §1604.9 34
41 C.F.R. §60-20.3(c) 31
45 C.F.R. §86.39 32
45 C.F.R. §86.56(b)(2) 32
30 Fed. Reg. 14928 36
37 Fed. Reg. 6835 ..... 34, 36
37 Fed. Reg. 6837 ..... 34, 36
38 Fed. Reg. 35336 32
38 Fed. Reg. 35337 32
38 Fed. Reg. 35338 32
39 Fed. Reg. 22237 32
40 Fed. Reg. 24135 32
40 Fed. Reg. 57980 24
Treas. Reg. §1.72-5 (1956) 24
Treas. Reg. §1.72-9 (1956) 24
Treas. Reg. 20.2031-10(f) (1970) 24

Miscellaneous:

109 Cong. Rec. 9205 (1963) 42
109 Cong. Rec. 9206 (1963) 41
109 Cong. Rec. 9217 (1963) 41
110 Cong. Rec. 2581 (1964) 23

PAGE

110 Cong. Rec. 2584 (1964) 23
110 Cong. Rec. 13663 (1964) 38
111 Cong. Rec. 13359 (1965) 35
EEOC General Counsel opinion letter (July 28, 1966), BNA F.E.P. Rep. 401:3011-12 33
Wage-Hour Administrator opinion letter No. 257 (May 27, 1964), CCH Wages & Hours ¶30,851 ..... 30, 31
Wage-Hour Administrator opinion letter No. 336 (Jan. 22, 1965), CCH Wages & Hours ¶30,945 31
Wage-Hour Administrator opinion letter No. 394 (Oct. 27, 1965), CCH Wages & Hours ¶30,996.22 31
Wage-Hour Administrator opinion letter No. 484 (Aug. 3, 1966), CCH Wages & Hours ¶30,997.26 31
Wage-Hour Administrator opinion letter No. 1117 (WH-70) (Aug. 25, 1970), CCH Wages & Hours ¶30,681 31
Wage-Hour Administrator opinion letter No. 1276 (WH-224) (Apr. 26, 1973), CCH Wages & Hours ¶30,874 31
American Council of Life Insurance, Life Insurance Fact Book 1977 ..... 17, 18
J. Athearn, Risk and Insurance (2d ed. 1969) 13
Bailey, Hutchison & Narber, *The Regulatory Challenge to Life Insurance Classification*, 25 Drake L. Rev. Ins. L. Ann. 779 (1976) 47
Cherry, 23 Transactions of the Society of Actuaries, "The 1971 Individual Annuity Mortality Table" 495-546 17
Daily Lab. Rep., No. 80 (Apr. 23, 1976) at A-12 43
Daily Lab. Rep., No. 122 (June 23, 1976) at E-3 47
E. Hicks, Accounting for the Cost of Pension Plans (1965) 19
King, *Men, Women and Life Annuities*, 43 J. Risk & Ins. 553 (1977) 47

PAGE

J. Magee, GENERAL INSURANCE (6th ed. 1961) 13
H. Moir, SOURCES AND CHARACTERISTICS OF THE PRINCIPAL MORTALITY TABLES (1919) 17
Myers, *Forum: Pension Benefits and Sex,* 9 CIVIL RIGHTS DIGEST 45 (1977) 47, 49
N.Y.S. Commission Against Discrimination, Interpretive Rulings, CCH EMPL. PRAC. GUIDE ¶26,053 (superseded) 30
N.Y.S. Insurance Dept., *Matter of Alleged Violations of Article IX-D of the Insurance Law;* Opinion and Report Pursuant to Section 278 of The Insurance Law at 3-4 (Jan. 28, 1975) 11
Oregon Attorney General, Opinion No. 6982 (May 23, 1973) 11
B. Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 1161-62 (1976) 16
P. Shepherd & A. Webster, SELECTION OF RISKS (1957) 44
TRANSACTIONS OF THE SOCIETY OF ACTUARIES, 1971 Reports of Mortality and Morbidity Experience, "Mortality Under Standard Ordinary Insurance Issues Between 1969 and 1970 Anniversaries" 17
TRANSACTIONS OF THE SOCIETY OF ACTUARIES, 1975 Reports of Mortality and Morbidity Experience, "Mortality Under Standard Ordinary Insurance Issues Between 1973 and 1974 Anniversaries" 17
United Nations, DEMOGRAPHIC YEARBOOK 1970 (1971) 17
2 U.S. Dep't of HEW, VITAL STATISTICS OF THE UNITED STATES, 1971 ..... 17, 18
U.S. EEOC 1st ANNUAL REPORT, H.R. Doc. No. 86, 90th Cong., 1st Sess. (1966) 32, 33
U.S. EEOC, FIRST ANNUAL DIGEST OF LEGAL INTERPRETATIONS, July 2, 1965 through July 1, 1966 ..... 34, 35
Wash. Attorney General, Opinion AGO 1973 No. 21 (Oct. 11, 1973) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, *et al.*,

Petitioners,

—v.—

MARIE MANHART, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN COUNCIL OF LIFE INSURANCE ON BEHALF OF PETITIONERS

Interest of the Amicus

The American Council of Life Insurance is a trade association consisting of 471 life insurance companies, including most of the major life insurers in the United States. Its members, collectively, have in force approximately 92% of the life insurance written in the United States, and hold 99% of the assets of insured pension plans.

Because of the nature of the business of its members, the Amicus is particularly qualified to offer to this Court its expertise in the significant actuarial and insurance-related issues which underlie this case, and to describe

the impact this Court's decision could have on the basic structure of the American life insurance industry.

The Amicus and one of its predecessors, the American Life Insurance Association, have participated in a number of insurance-related cases before this Court in recent years. *E.g., Liberty Mutual Insurance Co.* v. *Wetzel,* 424 U.S. 737 (1976); *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976); *Commissioner of Internal Revenue* v. *Standard Life & Accident Insurance Co.,* —— U.S. ——, 97 S. Ct. 2523 (1977).

SUMMARY OF ARGUMENT

This case poses a question of alleged sex discrimination under Title VII of the Civil Rights Act of 1964, which defies analysis in traditional terms. It presents the dilemma of reconciling traditional approaches to claims of discrimination, normally oriented toward individuals, with insurance concepts that, by definition, are founded upon group experience.

The conduct at issue—a requirement that female employees pay a greater amount than males for equal periodic pension benefit payments (and its correlative, the payment by an employer of unequal amounts to obtain such equal benefit payments) is, in an economic sense, wholly non-discriminatory; the difference in the total dollar value of the benefits received by female employees from that received by male employees justifies the difference in employee contributions. The distinction involved, while correlated with sex, is based upon a neutral factor: life expectancy. It is neither a baseless stereotype—sex-cor-

related differences in life expectancy have long been documented in the actuarial literature—nor is it based upon a preconception of the appropriate role of the female worker, which has the effect of impeding her entry into, and advancement within the work force.

While this lawsuit arises under Title VII, that statute, properly construed, does not require that real differentials in life expectancy be ignored in establishing contributions to pension plans. "Sex-segregated" actuarial tables are in widespread use both by government and private industry. They were in use as well at the time of the enactment of Title VII. To overturn these long-standing actuarial and insurance practices would incorrectly attribute to Congress an intention supported neither by logic nor by the meager legislative history of Title VII. By subordinating Title VII to the Equal Pay Act and interpretations under that statute, Congress made clear its intention to permit sex-related distinctions such as the one at issue in this case.

The majority decision below, if sustained by this Court, will have an impact far beyond merely preventing an employer from requiring unequal insurance contributions from his male and female employees. In the guise of an interpretation of an anti-discrimination statute, it could indirectly impose on the insurance industry a new federal actuarial rule requiring the utilization of "unisex" actuarial tables. This would seriously disrupt the life insurance and pension industry in the United States, potentially costing employers *billions* of dollars annually. It would raise difficult questions concerning annuities already purchased and pension and insurance plans already bargained for. Moreover, given the undeniable differential in male versus

female mortality, rates based upon "unisex" tables will be inherently unstable. In the case of annuities, the unisex rate will tend to rise to the level of the rate now charged for female employees; in the case of life insurance, the unisex rate will tend to rise to the level of the rate now charged for male employees. The net result may well be increased costs and a reduction in insurance coverage available for all employees.

THE DECISION BELOW

In its 2-1 decision, dated November 23, 1976, amended December 23, 1976 and May 5, 1977, the Ninth Circuit affirmed the granting of summary judgment to the plaintiffs (Respondents here). It approved the district court's ruling that the retirement plan of the City of Los Angeles Department of Water and Power (the "Department") violated Title VII of the Civil Rights Act of 1964[1] by requiring female employees to make larger contributions than male employees for their respective pension benefits.[2] The judgment enjoined the plan from requiring larger contributions from females, and ordered the plan to refund "excess contributions" collected on or after the date Title VII became applicable to municipal employers.[3]

Petitioners had claimed that while women were required to make larger pension contributions than men, this was

[1] 78 Stat. 253, *as amended by* the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§ 2000e *et seq.*

[2] *Manhart* v. *City of Los Angeles, Dep't of Water and Power*, 553 F.2d 581 (9th Cir. 1976), *cert. granted*, 46 U.S.L.W. 3214 (U.S. Oct. 3, 1977).

[3] Appendix at 134-35 (hereinafter "App. __").

a distinction based on longevity, not sex, and therefore did not violate Title VII. The Ninth Circuit held, however, that because the unequal pension contributions required of female employees were based upon the "average" experience of the group, rather than being measured individually, they were illegal. It relied upon the rule enunciated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 436 (1971) that employers were required "to make job-related decisions about each employee on the basis of relevant individual characteristics, so that the employee's membership in a racial, ethnic, religious, or sexual group is irrelevant to the decisions."[4] The Court of Appeals rejected petitioners' claim that the Bennett Amendment,[5] included in Title VII to prevent conflicts between that statute and the Equal Pay Act of 1963,[6] permitted the differential in contributions by employees. Moreover, it declined to defer to the interpretations of the Department of Labor Wage-Hour Administrator and followed, instead, EEOC guidelines similar to those rejected by this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976) (*"General Electric"*).

In response to a request for a rehearing or rehearing *en banc* in light of the decision in *General Electric*, the court adhered to its prior decision. Judge Kilkenny, based upon a careful analysis of the *General Electric* decision, dissented.

[4] 553 F.2d at 585.

[5] Civil Rights Act of 1964, Sec. 703(h), 42 U.S.C. § 2000e-2(h).

[6] 29 U.S.C. § 206.

ARGUMENT

DISTINCTIONS BETWEEN MALES AND FEMALES BASED UPON LIFE EXPECTANCY ARE NOT DISTINCTIONS ON ACCOUNT OF SEX

Respondents claimed, and the court below held, that the Department discriminated on the basis of sex by requiring female employees to make larger pension contributions than male employees, in order to obtain equal pension benefits. When employer pension contributions were considered, however, the fact is that the Department's female employees received *more* in additional employer contributions than the amount of the "excess" contributions they were required to make.[7] In any event, however, the threshold question to be resolved is whether a distinction between male and female employees based upon differences in anticipated life expectancy constitutes discrimination on account of sex.[8] We submit that the answer is "no".

This Court, in its decision in *General Electric,* has implicitly recognized that actuarially valid factors such as life expectancy can constitute a basis for differentiation be-

[7] The record showed that female employees contributed more than male employees, but that the Department's contributions per female employee likewise were larger than its contributions on account of a similarly situated male. The evidence further showed that the additional sum contributed by a female employee was *always* less than the amount by which the contribution of the Department for the female employee exceeded the contribution for a similarly situated male employee. (App. 86).

[8] *See General Electric,* at 136; *Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86, 95 (1973); *Willingham* v. *Macon Tel. Publishing Co.,* 507 F.2d 1084, 1088 (5th Cir. 1975) (*en banc*).

tween male and female employees, without constituting sex discrimination. There, the employer had been charged with sex discrimination for providing disability insurance coverage which excluded benefits for a specific risk: pregnancy. Despite the fact that this particular risk was correlated 100% with members of one sex, this Court held, in effect that the employer had made a lawful distinction on the basis of a cause of disability. It rejected the simplistic contention that this 100% correlation constituted sex discrimination, either on its face, or because of its "disparate effect" on women. Quoting from its decision in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), this Court noted:

> "'There is no evidence . . . that the selection of the risks insured by the program worked to discriminate against any definable group or class *in terms of the aggregate risk protection derived by that group or class from the program.* [*417 U.S.*] *at 496-497*'"[9] (emphasis supplied).

This Court then proceeded to examine the statistical and actuarial evidence in the record in *General Electric,* which demonstrated that, based upon its actual experience, the cost to General Electric of providing sickness and accident disability insurance was substantially greater, on the average, per female employee than per male employee. Accordingly, the majority opinion declared:[10]

[9] *General Electric,* at 135.

[10] *Id.* at 130-31, nn.9, 10. The lower court had expressly declined to find that "the present actuarial value of the coverage was equal as between men and women," (429 U.S. at 131) but stated that "even had it found economic equivalence, such a finding would not . . . have justified the exclusion of pregnancy related disabilities from an otherwise comprehensive . . . plan." (*Id.* at 130-31).

"Whatever the ultimate probative value of the evidence . . . on this subject . . . at the very least it tended to illustrate that the selection of risks covered by the Plan did not operate, in fact, to discriminate against women . . . . [W]e start from the indisputable baseline that '[t]he fiscal and actuarial benefits of the program . . . accrue to members of both sexes,' . . . .

• • •

The Plan, in effect . . . is nothing more than an insurance package, which covers some risks, but excludes others . . . .

• • •

As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme . . . ." (footnote omitted).[11]

Obviously, when this Court considered whether the insurance plan was "worth more to men than to women" it was not focusing upon any individual complainant.[12] Instead, its analysis focused upon the actuarial experience of the group, and the *value of the coverage to the average male or female employee*:

"Absent proof of different values, the cost to 'insure' against the risks is, in essence, nothing more than extra compensation to the employees, in the form of fringe

[11] *Id.* at 137-38.

[12] An eight-month pregnant female employee in obviously good health who would not receive coverage for her pregnancy and who was unlikely to require coverage for other causes of disability might indeed have found that the disability benefit coverage was "worth" less to her than to a man about to go into the hospital for a complicated operation.

benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the 'insurance,' *there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance,* due to the fact that her insurance had to cover the 'extra' disabilities due to pregnancy. While respondents seem to acknowledge that the failure to provide any benefit plan at all would not constitute sex-based discrimination in violation of Title VII, see n. 18, *infra,* they illogically also suggest that the present scheme does violate Title VII because 'a female must spend her own money to buy a personal disability policy covering pregnancy disability if she wants to be fully insured against a period of disability without income, whereas a male without extra expenditure is fully insured by GE against every period of disability.' Supplemental Brief for [Martha Gilbert et al.] on Reargument 11. Yet, in both cases—the instant case and the case where there is no disability coverage at all—the ultimate result is that a woman who wished to be fully insured would have to pay an incremental amount over her male counterpart due solely to the possibility of pregnancy-related disabilities. Title VII's proscription on discrimination does not require, in either case, the employer to pay that incremental amount. *The District Court was wrong in assuming, as it did, 375 F. Supp., at 383, that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required to be paid to one sex or the other because of*

their differing roles in 'the scheme of human existence.' "[13]

As will be discussed below,[14] the EEOC,[15] the Department of Labor and the Department of Health, Education and Welfare all have construed statutes or regulations prohibiting sex discrimination, to permit an employer to pay an equal amount on behalf of each male and female employee for fringe benefits, *even where that payment resulted in unequal* benefits being received by male and female employees.[16] This "equal payments" rule implicitly recognizes that, where the present value of the anticipated benefits to be received by members of one sex is equal to the present value of anticipated benefits to be received by similarly situated members of the other sex, no discrimination exists even though the periodic benefits to be received differ. These interpretations serve as an important indicator of the understandings of the agencies, and indeed, the federal government, as to the existence or non-existence of sex discrimination in the context of insurance and pension benefits.

Various state administrative agencies have likewise concluded that actuarial distinctions in insurance and pension

[13] *General Electric*, at 139 n.17 (emphasis supplied).

[14] *See infra* at 30-34.

[15] The EEOC subsequently repudiated its original position. *See infra* at 34.

[16] This principle has been applied in connection with life insurance benefits (where equal contributions will purchase a greater amount of life insurance coverage for a female than for a male, because of the longer female life expectancy), pension and annuity benefits (where the longer female life expectancy results in receipt of a lower periodic pension payment), and medical expense and disability insurance benefits (where the policy provided coverage for all causes of male disability, but excluded one cause of female disability—pregnancy).

plans do not constitute sex discrimination. For example, the Oregon Attorney General examined a state pension plan based upon sex-segregated actuarial tables and found it in compliance with state and federal law; the Washington State Attorney General ruled that insurers did not violate the state's anti-discrimination law by continuing to charge different premiums for males and females based upon life expectancy."

The New York State Superintendent of Insurance issued an opinion and report relating to whether underwriting practices which make distinctions based on the sex of the applicant or policyholder constitute unfair trade practices. The decision noted that, "[m]ore often than not, [sex-based] . . . underwriting distinctions emanate from unjustified subjective views of the role of women in our society," and ruled that "all underwriting distinctions based on sex . . . constitute an unfair trade practice under . . . [the New York] Insurance Law.[18] However, recognizing the validity of actuarial distinctions, the Superintendent expressly authorized "rate differentials . . . when supported by objective and valid statistical data."[19]

[17] Oregon Attorney General, Opinion No. 6982 (May 23, 1973); Wash. Attorney General, Opinion AGO 1973 No. 21 (Oct. 11, 1973).

[18] N.Y.S. Insurance Dep't, *Matter of Alleged Violations of Article IX-D of the Insurance Law*, OPINION AND REPORT PURSUANT TO SECTION 278 OF THE INSURANCE LAW at 3-4 (Jan. 28, 1975).

[19] *Id.* at 4, n.4. The decision went on to explain that the ban on underwriting distinctions based on sex:

> "does not mean that insurers cannot sell coverages that provide different but actuarially equivalent benefit levels for males and females *when a customer requires such coverage to avoid employment discrimination problems.*" (emphasis supplied) (*Id.* at 4, n.4).

Thus, this Court, as well as federal and state officials concerned with enforcement of anti-discrimination and insurance laws, have concluded that differences in insurable risks as between male and female employees, even though correlated with sex, stand as independent, lawful bases for distinguishing among employees.

TITLE VII DOES NOT PROHIBIT DISTINCTIONS BETWEEN MALE AND FEMALE EMPLOYEES BASED UPON LIFE EXPECTANCY

Even if a distinction between male and female employees on the basis of their respective life expectancies constitutes a gender-based distinction, we submit that this distinction does not constitute a discrimination on account of sex prohibited by Title VII. This follows from the inappropriateness of testing compliance of insurance and pension benefit programs against standards for determining the existence of sex discrimination which are oriented toward individuals, a lack of any legislative intent to reject the use of sex-segregated actuarial tables, and the controlling effect of the Equal Pay Act under which the use of such actuarial tables is permissible.

A. *Traditional Title VII Tests Of Sex Discrimination Cannot Meaningfully Be Applied To Valid Actuarial Distinctions In Insurance And Pension Benefits*

To understand the anomaly of attempting to apply traditional Title VII tests to insurance coverage offered employees as fringe benefits, requires an understanding of the nature and purposes of insurance.

Insurance serves two principal purposes:[20] (1) to reduce uncertainty as to the financial aspects of the risks[21] insured against, so that the insured, by paying a known premium can avert ultimate liability which he would face absent insurance against a given risk; and (2) to spread the economic burden of losses[22] among members of a group. The process by which these objectives are reached is the actuarial underwriting of the risk based upon experience, coupled with statistical assumptions as to such factors as interest rates applicable to monies paid in through insurance premiums. Those result in the computation of premium charges sufficient to fund anticipated losses, and pay such expenses as may be involved.[23]

Of course, if it were possible to know with certainty when a particular person will die, or will experience the particular loss insured against, then the insurer would simply charge premiums equal to the amount necessary to accumulate the policy benefit by the date of the loss. In short, insurance would be unnecessary since the insured could take the same amount of money and put it into savings.

Faced with an uncertain risk, the insured and the insurer are forced to make predictions as to when the loss will be experienced. However, because the insurer makes its predictions in gross, their positions differ significantly:

---

[20] *See* J. Athearn, RISK AND INSURANCE at 28 (2d ed. 1969); J. Magee, GENERAL INSURANCE 75-76 (6th ed. 1961).

[21] In insurance terms, a "risk" may be defined as the uncertainty of the happening of an unfavorable contingency. The term is also applied to the subject of the uncertainty (*i.e.*, to insure the life of a terminally ill person is a "bad risk"). *See* J. Magee, *supra* n.20, at 76-77; J. Athearn, *supra* n.20, ch. 1.

[22] A "loss" is the happening of the unfavorable contingency. J. Athearn, *supra* n.20, at 4.

[23] *See generally*, J. Athearn, *supra* n.20, chs. 1,2.

"The fundamental difference between the insurer and the insured is in predicting future events. So far as an individual insured is concerned, the insurer has no greater ability to predict than does the insured. The insurer, however, does not have to make the same prediction as the insured. The latter must predict what will happen to him as an individual. The insurer, on the other hand, makes predictions with regard to all insureds as a group. When a large number of risks is combined into a group, the risk faced by the insurer is not the same as that to which the insured is exposed nor is it merely the sum of the risks of all members of the group. The difference between the insurer which assumes a risk and the insured who transfers it lies in the fact that the former can make more accurate and reliable predictions with regard to its risk.

• • •

An insurer which assumes risks does so with the expectation of substituting average losses for actual losses, thus bringing certainty to insureds. Because the funds which are used to pay for losses suffered by insureds are typically collected from members of the group in advance, the insurer must be able to predict losses accurately. The fee (premium) charged for assuming a risk is based on such predictions and the predictions, in turn, are based on probability estimates." [24]

Thus, the fundamental principles of insurance are directed toward shifting economic risks of loss from an individual to a group. This was expressly recognized by the district court. It held, however, that since an individual

[24] J. Athearn, *supra* n.20, at 30-31.

female employee's contribution was linked to the "stereotyped" experience of an "average" woman, rather than that of the employee herself, the Department's pension plan violated Title VII."

The only case cited by the majority below in support of this proposition was *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 436 (1971). The District Court, in its decision granting plaintiffs' motion for a preliminary injunction, additionally had cited *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971); *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Sprogis* v. *United Air Lines Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); and *Willingham* v. *Macon Telegraph Publishing Co.*, 482 F.2d 535 (5th Cir. 1973).[25] The Court of Appeals candidly ad-

[25] The court below recognized the fundamental conflict presented by this case:

"The problem raised by this case is unique. There have been two basic policies which have guided the courts in prior Title VII litigation: (1) the policy against attributing general group characteristics to each individual member of the group, the major thrust of the statute, and (2) the policy allowing relevant employment factors to be considered in differentiating among individuals.

• • •

In the present case a relevant characteristic in determining how large an individual's retirement contribution should be is an informed prediction as to how long the person will live. But this characteristic, unlike those in the prior cases, is impossible to determine on an individual basis at the time when the contribution must be made. Thus, the policy of allowing relevant factors to be considered can be met only by allowing the group longevity statistics to be attributed to the individual members of the group. Yet this is exactly what the thrust of Title VII prohibits. We are therefore faced with the unique case in which the policy against per se discrimination directly conflicts with the policy of allowing relevant factors to be considered." (553 F.2d 581, 586).

[26] *Manhart* v. *City of Los Angeles, Dep't of Water and Power*, 387 F. Supp. 980, 983 (C.D. Cal. 1975).

mitted the inapplicability of cases such as *Rosenfeld*, *Sprogis* and *Phillips*:

> "An important basis of [the Ninth Circuit's decision in *Rosenfeld*] . . . was the fact that each individual applicant could actually be tested to see whether the relevant characteristic . . . was or was not in fact lacking.
>
> This same consideration has been present in [*inter alia*, the *Sprogis*, and *Phillips*][37] cases . . . ."[38]

The *Willingham* case was subsequently reversed *en banc*.[39] This Court's decision in *Griggs* indicated that the practices there challenged—requirement of a high school diploma, or a passing score on an intelligence test—were unacceptable because neither was "shown to bear a demonstrable relationship to successful performance of the jobs for which [they were] used."[40] As will be shown below,

---

[37] This Court's *per curiam* opinion in *Phillips* did not hold that the company's refusal to hire females with pre-school-age children necessarily violated Title VII; the Court stated that the existence of "conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under [the 'bona fide occupational qualification' exception to Title VII]", and remanded the case for further evidence. (*Phillips* v. *Martin Marietta Corp.*, *supra*, 400 U.S. at 544).

[38] 553 F.2d at 586.

[39] 507 F.2d 1084 (5th Cir. 1975).

[40] 401 U.S. at 431. Ironically, *Griggs*, cited by the majority for the principle that Title VII requires employers to treat employees on an individual basis, has emerged as the preeminent authority for the use of group statistics to establish a *prima facie* case of discrimination. *See* B. Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 1161-62 (1976).

Having approved the use of group statistics as a valid means of demonstrating the existence of discrimination against an individual, this Court is now being asked to condemn their use as evidence that no discrimination, in fact, exists.

the use of sex-segregated mortality tables is demonstrably related to prediction of male and female life expectancy.

Thus, none of the cases cited in support of the majority decision below presented the issue before this Court. The only decision which expressly considered the application of Title VII in an insurance/actuarial context was this Court's decision in *General Electric*.

Unlike the stereotypes, which have been condemned by the courts, the existence of the differential between male and female life expectancy[41] has not been questioned, nor has its statistical significance been challenged. Sex-segregated actuarial tables have been in use at least since 1843[42] and the difference has been corroborated in literally hundreds of tables compiled by government[43] and private industry.[44] In fact, recent evidence indicates that the disparity between male and female life expectancy is increasing; the disparity,

---

[41] According to data through 1975, female life expectancy at age 65, for example, is 4.3 years longer than male life expectancy. American Council of Life Insurance, LIFE INSURANCE FACT BOOK '77 at 92 (hereinafter "FACT BOOK").

[42] H. Moir, SOURCES AND CHARACTERISTICS OF THE PRINCIPAL MORTALITY TABLES 10, 14 (1919).

[43] *See, e.g.*, 2 U.S. Dep't of HEW, VITAL STATISTICS OF THE UNITED STATES, 1971, §5 at 5-3 to 5-10; United Nations, DEMOGRAPHIC YEARBOOK 1970 710-729 (1971).

[44] *See, e.g.*, FACT BOOK at 91-92; TRANSACTIONS OF THE SOCIETY OF ACTUARIES, *1975 Reports of Mortality and Morbidity Experience*, "Mortality Under Standard Ordinary Insurance Issues Between 1973 and 1974 Anniversaries", 1, 15-20; TRANSACTIONS OF THE SOCIETY OF ACTUARIES, *1971 Reports of Mortality and Morbidity Experience*, "Mortality Under Standard Ordinary Insurance Issues Between 1969 and 1970 Anniversaries", 18-22; Cherry, "The 1971 Individual Annuity Mortality Table", 23 TRANSACTIONS OF THE SOCIETY OF ACTUARIES 475-546.

which was 3.3 years at age 65 in 1965, had increased to 4.3 years, in 1975.[35]

Moreover, unlike role stereotypes such as those at issue in the *Phillips* v. *Martin Marietta Corp.* or *Rosenfeld* v. *Southern Pacific Co.* cases, where it was possible for an employer to evaluate individual female applicants to determine whether the stereotype characterization was valid, there is no way to determine the life expectancy of an individual, or to correct a mistake in predicting it.[36]

As will be described in the concluding point of this brief, the decision which this Court reaches as to the appropriate test to be applied under Title VII to insurance and pension benefits, will have an enormous impact on the employers, covered employees, and insurers of the United States. We submit that Title VII must be construed in a reasonable manner to accord with both economic and demographic reality. While the decision of the District Court stated that "stereotypic" distinctions based on sex, "whether rational or irrational,"[37] are condemned, this Court should construe Title VII to permit the rational; and not to require the irrational.

---

[35] 2 U.S. Dep't of HEW, VITAL STATISTICS OF THE UNITED STATES 1965, § 5 at 5-10; FACT BOOK at 92.

[36] While, theoretically, it would be possible to subject each applicant for an annuity to a rigorous physical examination and a detailed investigation of social habits and environmental factors, all of which would be relevant in predicting that applicant's life expectancy, this would refine the prediction, but would not convert the prediction into a certainty. The cost of such underwriting procedures would, moreover, make the insurance coverage prohibitively expensive.

[37] *Manhart* v. *City of Los Angeles, Dep't of Water and Power, supra,* 387 F. Supp. at 984.

B. *Title VII Does Not Prohibit Distinctions In Insurance And Pension Plans Between Male And Female Employees Based On Valid Differences In Life Expectancy*

Pension plans are customarily classified as either "defined benefit" or "defined payment" plans.[38] Under the former, the periodic benefit to be received by each employee, or the method of determining the benefit,[39] is specified in the pension plan (*e.g.,* $100 per month for life). Contributions are made by the employer and possibly the employee according to computations[40] designed to provide for the funding of the anticipated pension liability plus the attendant administrative and other costs. Under a "defined payment" plan, the employer pays a specified amount, and the periodic benefits payable to the employee upon retirement are based upon the amount of money accumulated to the time that benefits commence.[41]

Thus, in a defined payment plan, if a male and female employee, each age 35, work for 30 years before retirement, and have contributed on their behalf $1,000/year, at the date of retirement, each will have accumulated $30,000 plus earnings on that amount. If, according to the plan, this fund is converted into a life annuity upon retirement, the

---

[38] *See* E. Hicks, ACCOUNTING FOR THE COST OF PENSION PLANS at 142 (1965).

[39] The formulas often compute benefits according to an employee's length of service and salary prior to retirement.

[40] Such computations are predicated upon actuarial predictions as to matters such as the period over which the benefits will be paid (often the life of the insured or the insured and spouse) and the rate of return which can be earned on the premium contributions made.

[41] A variant of this is the "profit-sharing" plan where the amount paid in is computed according to a formula keyed to the employer's annual profits.

female employee would find that she would receive a monthly payment of approximately $622 while her male counterpart would receive approximately $730. At age 65 the life expectancy of females would be 19.2 years while the life expectancy of the male would in fact be 15.1 years.[42] The periodic payments received by female employees would be lower than those received by males, because the female employees would on the average, receive the payments over a longer period. In actuarial terms, however, the "value" of the benefits received by both male and female employees is the same.[43]

[42] This is only one of the various options which may be incorporated in any given plan. Some plans give the employee the right to take out, in a lump-sum payment, all or a portion of the accumulated fund. Other options which may be incorporated include annuities for a fixed period of time or annuities for the life of the employee and a survivor such as the spouse. Where a survivor option is elected, *i.e.*, the employee elects to take a reduced pension for the remainder of his or her life, with a periodic benefit to be paid to a designated survivor, a male employee suffers a greater reduction in the level of his periodic pension payments because of the higher likelihood that he will be survived by his spouse.

Inclusion of one or more options in the plan greatly complicates computation of the effect of a change in the basis for charging premiums since assumptions must be made as to which options may be selected by insureds at the time of their retirement.

Annuity figures are based on the 1971 Group Annuity Mortality Tables and six percent interest. The life expectancy figures are based on the same Mortality Tables.

[43] The concept of "value" in an actuarial sense was expressly considered by this Court in *Ithaca Trust Co.* v. *United States*, 279 U.S. 151 (1929). There, an estate attempted to deduct the value of property subject to a life estate of a widow. The issue presented was whether the "value" was that computed according to mortality tables "showing the probabilities on the day that the testator died" (279 U.S. at 155) or the value based upon actual circumstances—the widow had died within months of the death of the testator. Justice Holmes stated:

> "[T]he value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money it would bring in the market. Like all values, as the word is used by the law, it largely depends on more or less certain prophecies of the future; and the value is no less real at that time if later the prophecy turns out false than when it comes out true. Important as it is to correct certain improbabilities by the now certain fact, we are of opinion that it cannot be done, but that the value . . . must be estimated by the mortality tables." (citations omitted) (*Id*, at 155).

Conversely, under a defined benefit plan it is necessary for the employer to contribute a higher amount on behalf of a female employee, in order for a sufficient amount of money to have been accumulated to provide periodic payments equal to those of a similarly situated male employee. This is the inevitable consequence of the longer period during which it is anticipated that payments will be made to the female.

Obviously, under a simplistic analysis, either one of these types of plans could theoretically expose an employer to a claim of discrimination. Under the defined payment alternative, he would be providing a lower level of periodic benefit payments upon retirement to his female employees than to his male employees. Under the defined benefit approach, he would be contributing, in hard cash, more money on behalf of each female employee than each male employee.

In recognition of this, since 1964, the United States Department of Labor has consistently taken the position that, under the Equal Pay Act, an employer does not discriminate in providing fringe benefits to his employees where he complies with either the "equal payments" test, (*i.e.*, where an employer spends an equal amount for male and female employees to provide benefits, despite the fact that the periodic benefits purchased are unequal) or the "equal benefits" test (*i.e.*, where the periodic benefits provided to

male and female employees are identical, regardless of whether it costs more to purchase the benefits for members of one sex).

The rationale of this determination supports the practice challenged in the instant lawsuit, and, by reason of the Bennett Amendment,[44] stands as a bar to liability under Title VII. It is also persuasive evidence that Title VII, properly construed, does not prohibit the insurance and pension practices here at issue. The Equal Pay Act prohibits an employer to "discriminate . . . on the basis of sex"; similarly, Title VII forbids an employer from "discriminating against any individual . . . because of such individual's . . . sex . . . ."[45] As this Court noted in the *General Electric* case, the Department of Labor's interpretation comports both with "what seems . . . to be the 'plain meaning' of the language used by Congress when it enacted §703(a)(1)", and "what the concept of discrimination has traditionally meant . . . ."[46]

While the legislative history of the Title VII prohibition of sex discrimination has been characterized as "notable primarily for its brevity",[47] the same factor which this Court cited as significant in the *General Electric* decision—inclusion of the Bennett Amendment to require coordination of Title VII with the Equal Pay Act—indicates an intention to permit actuarial differentiations such as those involved in this case. *See* discussion, *infra,* at 35-42.

---

[44] Civil Rights Act of 1964, Sec. 703(h), 42 U.S.C. §2000e-2(h).

[45] The Courts have noted that the Equal Pay Act and Title VII are *in pari materia,* and therefore they should be construed consistently. *E.g., Shultz* v. *Wheaton Glass Co.,* 421 F.2d 259, 266 (3d Cir.), *cert. denied,* 398 U.S. 905 (1970).

[46] *General Electric,* at 145 (citations omitted).

[47] *General Electric,* at 143.

In addition to the Bennett Amendment, two other pieces of "formal" legislative history are of some relevance. Congresswoman St. George, in discussing the inclusion of sex as a protected classification within Title VII, declared that women neither sought nor needed "special privileges".[48] Furthermore, Congresswoman Green, in her remarks, made clear that no consideration had been given in committee to problems which might arise by reason of biological differences between men and women.[49] The failure to consider the impact of a generalized prohibition of sex discrimination upon insurance and pension plans, suggests that, in all likelihood, no sweeping change in practice was intended. *See Willingham* v. *Macon Telegraph Publishing Co., supra,* 507 F.2d at 1090.

Other than this limited legislative history, the only other available guideposts for determining the "legislative intent" underlying Title VII as applied to insurance and pension benefits, are the practices which prevailed throughout the government and the private sector both prior and subsequent to the enactment of Title VII.

The types of plans described above have been offered in the United States by employers and insurers since approximately 1875. The principles applicable to them have been widely understood.

The validity of using sex as a basis for the classification of risk has been recognized by the Federal Government and by almost every state.

Certain sections of the Internal Revenue Code and Treasury Regulations specifically prescribe the use of sex-segre-

---

[48] 110 Cong. Rec. 2581 (1964).

[49] 110 Cong. Rec. 2584 (1964).

gated actuarial tables. Regulations under Section 72 of the Internal Revenue Code,[50] for example, require the computation of "expected return" under annuity contracts based upon actuarial tables which are sex-segregated and involve a five-year differential between male and female life expectancy.[51]

Section 20.2031-10 of the Estate Tax Regulations[52] prescribes mortality tables differentiated on the basis of sex to be used in valuing non-commercial annuities, life interests and remainders. These tables have been incorporated by reference into the tax schemes of numerous states.[53]

The recently created Pension Benefit Guaranty Corporation created by the Employee Retirement Income Security Act of 1974[54] prescribes sex-segregated actuarial tables to be used in valuing plan benefits upon pension plan termination.[55]

These practices of the Federal Government stand as persuasive evidence that Congress could not have intended to

[50] INT. REV. CODE OF 1954, §72; Treas. Reg. §1.72-5 (1956).

[51] Treas. Reg. §1.72-9 (1956).

[52] Treas. Reg. §20-2031-10(f) (1970).

[53] Ala. Code tit. 51, §432 (1958); Alaska Stat. §43.31.011 (1977); Cal. Rev. & T. Code §13953 (West Supp. 1974); Del. Code tit. 30, §1326 (1974); Fla. Stat. Ann. §198.02 (West 1971); Ga. Code Ann. §92-3401 (1974); Ind. Code Ann. §6-4.1-1-5 (Burns 1976); Md. Ann. Code art. 81, §160 (Supp. 1976); Mass. Ann. Laws. ch. 65, §13 (Michie/Law Co-op Supp. 1976); Neb. Rev. Stat. §77-2008 (1976); N.H. Rev. Stat. Ann. §86:11 (Supp. 1975); N.M. Stat. Ann. §72-33-3 (Supp. 1975); N.D. Cent. Code §57-37.1-03 (Supp. 1977); Or. Rev. Stat. §118.150 (1975); S.C. Code §12-15-40 (1976); Tex. Tax Code tit. 20A, §14.08 (1971); Utah Code Ann. §59-12A-3 (1977); Vt. Stat. Ann. tit. 32, §7442 (1971); Wis. Stat. Ann. §72.28 (West 1972).

[54] 29 U.S.C. §1001 *et seq.* (Supp. V. 1975).

[55] 40 Fed. Reg. 57980-82 (1975).

reject the use of sex-segregated actuarial tables when it enacted Title VII.

In *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), this Court rejected an EEOC guideline under Title VII which purported to equate discrimination on account of citizenship with discrimination on account of national origin. Among the reasons for its decision was the fact that federal agencies themselves were utilizing the precise distinction which the EEOC sought to condemn:

> "Since 1914, the Federal Government itself, through Civil Service Commission regulations, has engaged in what amounts to discrimination against aliens by denying them the right to enter competitive examination for federal employment . . . . But it has never been suggested that the citizenship requirement for federal employment constitutes discrimination because of national origin, even though since 1943, various Executive Orders have expressly prohibited discrimination on the basis of national origin in Federal Government employment . . . .
>
> • • •
>
> Congress itself has on several occasions since 1964 enacted statutes barring aliens from federal employment. The Treasury, Postal Service, and General Government Appropriation Act, 1973, for example, provides that 'no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . unless such person (1) is a citizen of the United States . . . .'
>
> • • •

> To interpret the term 'national origin' to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy. This Court cannot lightly find such a breach of faith." [56]

See also Morton v. *Mancari*, 417 U.S. 535, 548-49 (1974).

Moreover, Congress must be presumed to have been aware of the practices of state governments and private industry when Title VII was enacted.[57] If it intended to effect a change in these policies, certainly it would have made its intention plain.[58] For example, state statutes in effect in 1964, expressly prescribed sex-segregated actuarial tables in Arizona;[59] provided for their use in the determination of value of future, contingent and limited estates in California;[60] in the valuation of annuities in Iowa;[61] and, as evidence of life expectancy in North Dakota.[62]

---

[56] 414 U.S. at 89-91 (citations omitted).

[57] *See, e.g., Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 90-91 (1973); *American Fed'n of Musicians* v. *Wittstein*, 379 U.S. 171 (1964); *Ranes* v. *Office Employees Int'l Union*, 317 F.2d 915, 917-18 (7th Cir. 1963). *See also Employers Mut. Liability Ins. Co.* v. *Arrien*, 244 F. Supp. 110, 114 (N.D.N.Y. 1965).

[58] *See Ranes* v. *Office Employees Int'l Union*, 317 F.2d 915, 917-18 (7th Cir. 1963). *See also* cases, *supra* n.57.

[59] Ariz. Rev. Stat., vol. 18, Table VIII, & Supp., Tables VIII-X, at 186-96 (West 1956 & Supp. 1977).

[60] Cal. Rev. & T. Code §13953 (West Supp. 1976).

[61] Iowa Code Ann. §450.51 (West 1971); Iowa Code Ann., vol. 58, at 287-92 (West Supp. 1977) [tables].

[62] N.D. Cent. Code §31-08-05 (1976).

Nor did the enactment of Title VII alter the perception of state governments as to the propriety of using sex-based actuarial tables. State statutes relating to the valuation by insurers of life insurance and annuity liabilities for the purpose of computing required reserves are virtually unanimous in permitting the value of policies issued on female lives to be calculated based upon the mortality experience of males three years *younger* (*i.e.*, a three-year "setback") than the insured females.[63]

---

[63] Ala. Code tit. 28A, §744 (Supp. 1973); Alaska Stat. §21.18.110 (1962); Ariz. Rev. Stat. §20-510 (1975); Ark. Stat. Ann. §66-2511 (1965); Cal. Ins. Code §§10485 and 10489.2 (West 1971); Col. Rev. Stat. §10-7-309 (1973); Conn. Gen. Stat. §38-130 (1975); Del. Code tit. 18, §§1112 and 1113 (1974); D.C. Code Encyel. §35-701 (West 1967); Fla. Stat. Ann. §625.121 (West 1972); Ga. Code Ann. §56-912 (1977); Haw. Rev. Stat. §431-269 (1968); Idaho Code §41-612 (1977) [6-year setback permitted]; Ill. Ann. Stat. ch. 73, §835 (Smith-Hurd 1965); Ind. Code Ann. §27-1-12-10 (Burns 1975); Iowa Code Ann. §508.36 (West Supp. 1977); Kan. Stat. §40-409 (1973); Ky. Rev. Stat. §304.6-140 (1970); La. Rev. Stat. tit. 22, §163 (West Supp. 1977); Me. Rev. Stat. tit. 24-A, §953 (1974); Md. Ann. Code art. 48A, §83 (1972); Mass. Ann. Laws ch. 175, §9 (Michie/Law Co-op 1977); Mich. Comp. Laws §500.834 (1970); Minn. Stat. Ann. §61A.25 (West 1968); Miss. Code Ann. §83-7-23 (1972); Mo. Ann. Stat. §376.380 (Vernon 1968); Neb. Rev. Stat. §44-404 (1974); Nev. Rev. Stat. §681B.120 (1973); N.H. Rev. Stat. Ann. §410.3 (1968); N.J. Stat. Ann. §17B:19-8 (West 1977); N.M. Stat. Ann. §58-7-5 (1962); N.Y. Ins. L. §205 (McKinney 1966 & Supp. 1976); N.C. Gen. Stat. §58-201.1 (1975); N.D. Cent. Code §26-10.1-02 (Supp. 1977) [6-year setback permitted]; Ohio Rev. Code Ann. §3903.36 (Page 1971); Okla. Stat. Ann. tit. 36, §1510 (West 1976); Or. Rev. Stat. §733.130 (1975); 40 Pa. Stat. Ann §71 (Purdon 1971); S.C. Code §38-7-90 (1976); S.D. Compiled Laws Ann. §58-26-22 (1967); Tenn. Code Ann. §56-115 (1968); Tex. Ins. Code art. 3.28 (Vernon 1963); Utah Code Ann. §31-22-14 (1974); Vt. Stat. Ann. tit. 8, §3784 (1970); Va. Code §38.1-456 (1976); Wash. Rev. Code §48.12.150 (1974); W. Va. Code §33-7-9 (1975); Wis. Stat. Ann. §206.201 (West Supp. 1977); Wyo. Stat. §26.1-104 (1957); *cf.* Mont. Rev. Codes Ann. §40-3011 (1961).

In 1977, Arkansas, Colorado, Illinois, Nevada, New Mexico, New York, Oregon, South Dakota, Texas, West Virginia, and Wisconsin

Similarly, state "non-forfeiture" statutes, used to compute paid-up non-forfeiture benefits and cash surrender values of policies where premium payments are in default, permit female mortality to be computed based upon a three-year setback from male experience.[44]

State insurance laws typically contain provisions prohibiting discrimination in rates between similarly situated

joined Idaho and North Dakota in amending their valuation statutes to permit a six-year setback. Similar amendments to their non-forfeiture statutes were enacted. *See infra* n.64.

[44] Ala. Code tit. 28A, §373 (Supp. 1973); Alaska Stat. §21.45.300 (1962); Ariz. Rev. Stat. §20-1231 (1975); Ark. Stat. Ann. §66-3327 (1965); Cal. Ins. Code §10163.5 (West 1971); Col. Rev. Stat. §10-7-309 (1973); Del. Code tit. 18, §2929 (1974); D.C. Code Encycl. §35-705b (West 1967); Fla. Stat. Ann. §627.476 (West 1972); Ga. Code Ann. §56-2504 (1977); Haw. Rev. Stat. §431-561 (1968); Idaho Code §41-1927 (1977) [6-year setback permitted]; Ill. Ann. Stat. ch. 73, §841.2 (Smith-Hurd 1965); Ind. Code Ann. §27-1-12-7 (Burns 1975); Iowa Code Ann. §508.37 (West Supp. 1977); Kan. Stat. §40-428 (1973); Ky. Rev. Stat. §304.15-340 (1970); La. Rev. Stat. tit. 22, §168 (West Supp. 1977); Me. Rev. Stat. tit. 24-A, §2532 (1974); Md. Ann. Code art. 48A, §414 (1972); Mass. Ann. Laws ch. 175, §144 (Michie/Law Co-op 1977); Mich. Comp. Laws §500.4060 (1970); Minn. Stat. Ann. §61A.24 (West 1968); Miss. Code Ann. §83-7-25 (1972); Mo. Ann. Stat. §376-670 (Vernon 1968); Mont. Rev. Codes Ann. §40-3831 (1961); Neb. Rev. Stat. §44-407.04 (1974); Nev. Rev. Stat. §688A.320 (1973); N.H. Rev. Stat. Ann. §409.5 (1968); N.J. Stat. Ann. §17B:25-19 (West 1977); N.M. Stat. Ann. §58-8-3 (1962); N.Y. Ins. L. §208-a (McKinney 1966 & Supp. 1976); N.C. Gen. Stat. §58-201.2 (1975); N.D. Cent. Code §26-03.2-05 [6-year setback permitted] (Supp. 1977); Ohio Rev. Code Ann. §3915.07 (Page 1971); Okla. Stat. Ann. tit. 36, §4029 (West 1976); 40 Pa. Stat. Ann. §510.1 (Purdon 1971); S.C. Code §38-7-90 (1976); S.D. Compiled Laws Ann. §58-15-38 (1967); Tenn. Code Ann. §56-1113 (1968); Tex. Ins. Code Art. 3.44 (Vernon 1963); Utah Code Ann. §31-22-13 (1974); Vt. Stat. Ann. tit. 8, §3747 (1970); Va. Code §38.1-465 (1976); Wash. Rev. Code §48.23.350 (1974); W. Va. Code §33-13-30 (1975); Wis. Stat. Ann. §206.181 (West Supp. 1977); Wyo. Stat. §26.1-364 (1957).

individuals.[45] Such laws have not, however, been construed to prohibit use of sex-segregated mortality tables; the differential in male-female life expectancy is considered to place males and females of the same age into different classes, justifying the imposition of different rates.

In addition to statutes which expressly permit or require the use of sex-segregated actuarial tables, various state fair employment laws make clear that actuarially based sex-distinctions in insurance retirement and pension plans do not contravene the states' policies to ban sex discrimination. For example, the California statute provides:

> "Nothing contained in this part relating to discrimination on account of sex . . . shall be deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided such terms or conditions are in accord-

[45] *See, e.g.*, CAL. INS. CODE §790.03 (West Supp. 1976); D.C. CODE ANN. §35-715 (1973). These statutes generally derive from the National Association of Insurance Commissioners Model Unfair Trade Practices Act which, *inter alia*, defines as an unfair trade practice and prohibits:

> "Making or permitting any unfair discrimination between individuals of the same class *and equal expectation of life* in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract." (1947 NAIC Proc. at 392-400) (emphasis added).

In effect, men and women of the same age are not similarly situated with respect to life expectancy. Thus, under the usual definition of discrimination—unequal treatment of similarly situated persons—no discrimination exists. *See Cohen* v. *Chesterfield County School Bd.*, 474 F.2d 395, 397-98 (4th Cir. 1973), *rev'd on other grounds sub nom., Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974); *Rafford* v. *Randle Eastern Ambulance Serv., Inc.*, 348 F. Supp. 316, 320 (S.D. Fla. 1972).

ance with customary and reasonable or actuarially sound underwriting practices." [66]

Finally, federal and state administrative agencies have been virtually unanimous in concluding that no sex discrimination exists where an employer complies with either the "equal payments" or "equal benefits" rule in providing insurance or pension benefits to employees.[67] The "equal payments" rule recognizes the actuarial fact that some fringe benefits cost more to provide to members of one sex, and therefore, an equal expenditure on behalf of males and females will purchase benefits having actuarially equal values, but resulting in differing levels of payments to male and female employees.

The "equal payments" formulation has been set forth in the Department of Labor Interpretive Bulletin under the

[66] Cal. Lab. Code §1432 (West Supp. 1977). *See also* Del. Code tit. 19, §711(h) (1975); Iowa Code Ann. §601A.12 (West 1975); Me. Rev. Stat. tit. 5, §4573 (1973 Supp. Pamphlet); Mo. Ann. Stat. §296.020(8) (Vernon Supp. 1976); Mont. Rev. Codes Ann. §64-328 (Supp. 1976); Or. Rev. Stat. §659.028 (1975); Pa. Cons. Stat. tit. 43, §955 (Purdon Supp. 1977).

In its August 21, 1968 interpretive rulings construing the New York State Fair Employment Practices Law, the State Commission Against Discrimination provided, *inter alia*:

"I. Insurance Coverage

a. In administering group life insurance, health insurance or other "fringe benefits", the employer may make distinctions between men and women workers to the extent that they are required by the underwriting policies of insurance carriers."

CCH Empl. Prac. Guide ¶26,053, at 8906 (superseded).

[67] The first articulation of this position by the Department of Labor Wage-Hour Administrator appears to have been in May of 1964, more than a year before July 2, 1965, the effective date of the employment provisions of Title VII. *See* Civil Rights Act of 1964, Sec. 716(a), 78 Stat. 266; Wage-Hour Administrator Opinion Letter No. 257, CCH Wages & Hours ¶30,851 (May 27, 1964).

Equal Pay Act,[68] and in a long series of opinion letters applicable to various forms of insurance[69] and pension benefits.[70]

The Department of Labor Office of Federal Contract Compliance[71] and the Department of Health, Education

[68] 29 C.F.R. §800.116(d) (1967):

"(d) *Contributions to employee benefit plans.* If Employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees."

[69] *E.g.*, Wage-Hour Administrator, Opinion Letter No. 257, CCH Wages & Hours ¶30,851 (May 27, 1964); Wage-Hour Administrator, Opinion Letter No. 336, CCH Wages & Hours ¶30,945 (Jan. 22, 1965); Wage-Hour Administrator Opinion Letter No. 394, CCH Wages & Hours ¶30,996.22 (Oct. 27, 1965); Wage-Hour Administrator, Opinion Letter No. 484, CCH Wages & Hours ¶30,997.26 (Aug. 3, 1966).

[70] *E.g.*, Wage-Hour Administrator, Opinion Letter No. 1117 (WH-70), CCH Wages & Hours ¶30,681 (Aug. 25, 1970); Wage-Hour Administrator, Opinion Letter No. 1276 (WH-224), CCH Wages & Hours ¶30,874 (April 26, 1973):

"Specifically you ask: 'If an employer makes equal contributions to a retirement plan covering male and female employees but if, as a result of separate actuarial tables used by the plan's administrators, the female employees, other things being equal, receive smaller monthly retirement benefits [from] the employer in violation of the equal pay provisions?'

. . . [O]ur opinion letter of August 25, 1970 [W & H Opinion Letter No. 1117], sets forth our current position under the Equal Pay Act. We are cognizant of the recent amendments to the Civil Rights Act and the Guidelines issued by Equal Employment Opportunity Commission (EEOC) on pension benefits and we will continue to watch developments in this area. However, we do not anticipate any change in our position in the immediate future."

[71] OFCC Guidelines, 41 C.F.R. §60-20.3(c) (1970). The OFCC considered adopting the EEOC's 1972 interpretation requiring the

and Welfare"[72] similarly concluded that no sex discrimination was involved where an employer made equal contributions on behalf of male and female employees, but the amount of fringe benefit payments received by the employee differed.

Indeed, the first time that the EEOC focused its attention upon the problem, it acknowledged the correctness of the Department of Labor's "equal payments/equal benefits" approach in determining the existence of sex discrimination. In its 1st Annual Report, EEOC stated:

> "The Commission determined that an employer does not commit an unlawful employment practice by contributing to or negotiating accident insurance programs which provide different benefits for male and female employees based upon reasonable actuarial considerations, as long as the cost to the employer is the same for both groups of employees. Similarly, no violation occurs when male and female employees receive the same benefits but the employer's contribution to the plan differs according to the sex of the employee.

payment of equal benefits to employees regardless of cost. *See* 38 Fed. Reg. 35336-38 (Dec. 27, 1973). To date, the OFCC has adhered to its original position.

[72] *See* Dep't of HEW Regulations, 45 C.F.R. §§86.39, 86.56(b)(2) (1976). The Department of HEW also considered changing its position to conform to the new EEOC position, but it also, to date, has not done so. *See* 40 Fed. Reg. 24135 (June 4, 1975).

The Department of HEW is the only agency to have expressly considered a "unisex" approach to computing contributions to be paid on behalf of male and female employees. 39 Fed. Reg. 22237 (1974). To date, HEW has not adopted such an approach.

> A related question is the difference in treatment between male and female employees under pension and retirement plans. Although a retirement program which requires female employees to retire at age 62 and male employees at age 65 would appear to violate Title VII, the Commission had not so ruled by June 30, 1966. The retirement plan problem is proving exceedingly complex, in large part because of the variety of methods in which pension plans are funded and the fact that, under plans in existence at the time Title VII was enacted, contractual rights have arisen which cannot be disturbed without producing inequitable results." U.S. EEOC, 1ST ANNUAL REPORT, H.R. Doc. No. 86, 90th Cong., 1st Sess. 41-42 (1966).

In a 1966 opinion letter, Charles T. Duncan, the General Counsel of the EEOC, stated:

> "The Commission . . . does not feel that an employer commits an unlawful employment practice by contributing to or negotiating insurance programs which provide different benefits for male and female employees based upon reasonable actuarial considerations required by insurance underwriters. Nor does the Commission believe that a violation of Title VII occurs when male and female employees receive the same benefits, but the employer's contributions to the plan differ, depending upon the sex of the employee. When employees receive the same benefits, but the employees' contributions to the plan differ depending upon the sex of the employee, no violation of Title VII occurs *if the differing employees' contributions are based upon reasonable actuarial grounds.*"[73]

[73] BNA F.E.P. Rep. 401:3011-12 (July 28, 1966) (emphasis added).

See also opinion letter, described in U.S. EEOC, FIRST ANNUAL DIGEST OF LEGAL INTERPRETATIONS, July 2, 1965 through July 1, 1966 at 22-23; U.S. EEOC, 1st ANNUAL REPORT, *supra* at 41-42.

This interpretation remained in effect until April 1972. In the same release in which it erroneously proclaimed illegal the denial of disability benefits on account of pregnancy, the EEOC repudiated its acceptance of the equal payments rule:

> "(e) It shall not be a defense under title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." [74]

This sudden about-face taken eight years after the adoption of Title VII is entitled to no deference by this Court.[75]

In sum, the widespread acceptance and use of sex-segregated actuarial data prior and subsequent to the enactment of Title VII, the uniform practice of federal agencies (including, until 1972, the EEOC) recognizing actuarial equality as precluding a finding of sex discrimination, and the available formal legislative history which in no way suggests an intention to work a major change on the insurance industry,[76] all lead to the inescapable conclusion that Title

[74] 29 C.F.R. §1604.9, 37 Fed. Reg. 6835, 6837 (April 4, 1972).

[75] *See General Electric*, at 140-43; *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858-59 n.25 (1975); *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974); *Espinoza* v. *Farah Mfg. Co., supra*, 414 U.S. 86, 92-96 (1973); *Skidmore* v. *Swift Co.*, 323 U.S. 134, 140 (1944).

[76] Of course, had Congress intended to work a substantial change in prevailing pension and insurance practices, it would have required little effort to insert into the statute, or the legislative history, some tangible evidence of this intent. *See Ozawa* v. *United States*, 260 U.S. 178, 192-94 (1922); *Toilet Goods Ass'n* v. *Finch*, 419 F.2d 21, 27 (2d Cir. 1969); *Friedman* v. *United States*, 374 F.2d 363, 366-67 (8th Cir. 1967); *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931, 945 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Kettell* v. *Johnson & Johnson*, 337 F. Supp. 892, 895 (E.D. Ark. 1972); *Zachary* v. *R. H. Macy & Co.*, 31 N.Y.2d 443, 460 (1972).

VII, properly construed, does not require that actuarial distinctions between males and females be ignored.

C. *Differentials Based Upon Life Expectancy Are Permitted Under The Equal Pay Act And Therefore Do Not Violate Title VII*

Because it feared conflicting interpretations under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, Congress enacted, as part of the latter statute, Section 703(h), the Bennett Amendment:[77]

> "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

The intention of this amendment is clear: "Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." [78]

Originally, the EEOC recognized the primacy of interpretations under the Equal Pay Act in the area of the De-

[77] 42 U.S.C. §2000e-2(h).

[78] 111 Cong. Rec. 13359 (1965) (remarks of Senator Bennett).

partment of Labor's competence. Its 1965 Guidelines provided, in pertinent part:

> "§1604.7 Relationship of Title VII to the Equal Pay Act.
>
> (a) Title VII requires that its provisions be harmonized with the Equal Pay Act in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII." [79]

This remained the stated position of the EEOC for six and one-half years until it was modified in the 1972 Guidelines[80]

[79] 30 Fed. Reg. 14928 (December 2, 1965) (citation omitted) (superseded).

The Department of Labor had no trouble construing the plain language of the Bennett Amendment to mean that in the area of sex discrimination in pay its interpretations were to control in applying Title VII. In Wage-Hour Opinion WH-140, July 1, 1971, the Wage-Hour Deputy Administrator stated, in part:

> "This is in further reference to your letter . . . concerning the application of the Civil Rights Act to a proposed insurance program.
>
> • • •
>
> . . . Title VII is administered by the Equal Employment Opportunity Commission, not the Department of Labor. However, the Equal Pay Act of 1963 . . . applies to fringe benefits which are deemed to be remuneration for employment where the Act's standards otherwise apply and, since Title VII of the Civil Rights Act of 1964 requires that relevant opinions of the Administrator of the Wage and Hour Division in the Department of Labor are to be adopted by the Commission in the making of interpretations under Title VII, we believe we can be of assistance to you." (Wage-Hour Opinion, WH-140, July 1, 1971, BNA Wage & Hour Man. 95:657).

[80] 29 C.F.R. §1604.8, 37 Fed. Reg. 6835, 6837 (April 5, 1972).

in which the EEOC also reversed its position on "the equal benefits/equal payments" rule, and on the appropriate treatment of disability on account of pregnancy. As this Court recognized in *General Electric,* notwithstanding the protestations of the EEOC, pay practices which are proper under the Equal Pay Act are not actionable under Title VII.[81]

As discussed, *supra,* at 30-31, the position taken by the Department of Labor Wage-Hour Administrator demonstrates that under the Equal Pay Act, and therefore under Title VII, an actuarially established differential would not offend either of the two statutes, where the employer complies with the equal payments test.

The applicability of the Wage-Hour Administrator's interpretation to claims of sex discrimination in pension benefits was only recently upheld by Judge Gignoux in *EEOC* v. *Colby College.*[82] There, the EEOC challenged Colby College's annuity and life insurance programs, claiming they violated Title VII, since the dollar amount of periodic annuity payments was calculated on the basis of sex-segregated mortality tables. As a result, the female

[81] *General Electric,* at 143-44.

[82] BNA Daily Lab. Rep., No. 212, Nov. 2, 1977 at D-1 (D. Maine, Oct. 27, 1977). The pension and insurance program of Colby College was funded through Teachers Insurance and Annuity Association and College Retirement Equities Fund, and provided for contributions to the fund based upon the salary of the participating employee. Similarly situated male and female employees enrolled in the retirement annuity and life insurance plans each made equal contributions, and the school's contributions on account of similarly situated male and female employees were the same. (*Id.* at D-1 to D-2). Under the annuity plan, the employee, at retirement, could select various options (usually, periodic payments for the lifetime of the insured, or for the lifetime of two persons such as the insured and spouse).

annuitants received lower periodic benefits than did the male annuitants. In the case of the life insurance plan, the effect was reversed; male insureds received lower death benefits than similarly situated females because of the higher male mortality rate. The EEOC disregarded the fact that similarly situated male and female employees covered by the annuity and life insurance plans received coverage having the identical present actuarial value.

The court examined the Bennett Amendment and its legislative history and found they manifested "the plain intent of Congress to avoid subjecting employers to two conflicting standards . . . and to provide that any possible conflict between the requirements of Title VII and the Equal Pay Act is to be resolved in favor of the Equal Pay Act."[33] The court noted that the EEOC initially acknowledged that it was required to adhere to interpretations under the Equal Pay Act, and, as this Court did in *General Electric*, Judge Gignoux rejected the EEOC's later attempt to disavow its earlier position. Similarly, the Wage-Hour Administrator's "equal payment/equal benefit" formulation, initially adopted by the EEOC, was held to be controlling, warranting summary judgment for the defendants."[34]

[33] *EEOC* v. *Colby College*, *supra* n.82, at D-2. The court also cited the statement of Senator Humphrey, quoted by this Court in the *General Electric* decision, that the purpose of the Bennett Amendment was to make it "unmistakably clear" that "differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill if it becomes law[.]" (110 Cong. Rec. 13663-64 (1964)).

[34] While the court distinguished the instant case, it expressly declined to follow the holding of the Ninth Circuit majority to the extent that it had "found a qualitative distinction between a benefits program in which the direct cost to participant varies on the basis of the participant's sex and one in which the benefits accrue differently to one group of enrollees to another due to the sex of the particular enrollees." (*EEOC* v. *Colby College*, *supra* n.82, at D-4).

Here, the Department of Labor, in its brief to the court below, argued that, while an employer may lawfully make unequal contributions for employees in order to provide equal benefits, or equal contributions, which result in unequal benefits, the employer runs afoul of the Equal Pay Act by requiring *employees* to make unequal contributions to obtain equal benefits. The illogic of this distinction becomes clear from the following hypothetical example: Under the equal payments rule, if the employer had purchased $10 worth of annuity benefits for male and female employees, he would not be guilty of sex discrimination even though the periodic payment to be received by a female employee upon retirement would be somewhat less than that payable to a male. In order for a female employee to obtain additional coverage to bring the level of her periodic payments up to the level of male employees, she would have to pay an insurer an incremental amount to purchase the additional coverage. If, instead, the employer collected from the female employee a payment representing a part of this difference and himself paid the balance, he would, under the Labor Department's theory, be exposed to liability for sex discrimination in pay. This, we submit, makes no sense.

Since it has been consistently held that payments by an employer for fringe benefits constitute wages,[35] the fact of discrimination in the payment of wages cannot logically depend upon whether the employer hands the money involved to the employee or to an insurer, or indeed pays it directly into his own pension benefit plan.[36]

[35] *See, e.g.*, *Inland Steel Co.* v. *NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

[36] As this Court noted in the *Geduldig* and *General Electric* cases, there is no operative distinction, under Title VII or the

It follows, both from the Department of Labor equal payments/equal benefits rule[87] and from the statutory exception discussed below, that actuarially based distinctions incorporated by employers into their pension plans do not involve sex discrimination under either the Equal Pay Act or Title VII.

The Equal Pay Act enumerates four specific exceptions. The last, Section 206(d)(1)(iv), is pertinent here:

> "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages . . . at a rate less than the rate to which he pays wages to the opposite sex . . . for equal work on jobs, the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions except where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex . . . ."

Clearly, if the fourth exception were intended to refer only to factors neither correlated with nor based upon sex, it would be meaningless; the statute would, by its terms not apply in the first place. The legislative history of this provision, however, makes clear that it was intended to be applied to authorize differentials based upon objective factors which happen to correlate with sex.

Equal Protection clause between the purchase of insurance from an outside party, or self-insurance, in determining the existence of sex discrimination. *General Electric*, at 138 n.16; *Geduldig* v. *Aiello*, *supra*, 417 U.S. at 492.

[87] The validity of the Department of Labor equal benefits/equal payments rule derives either from the exception to the Equal Pay Act discussed below, or from the fact that the rule does not involve a sex distinction at all. *See* discussion *supra* at 6-12. In either case there would be no liability under Title VII.

During the course of the debates over the Equal Pay Act, Representative Findley of Illinois introduced an amendment which expressly would have allowed wage differentials based on the difference in cost associated with the employment of members of different sexes.[88] Congressman Goodell, one of the sponsors of the bill, spoke of the effect of the bill even absent the proposed amendment:

> " . . . there are many factors that can be taken into consideration in working out differentials of pay among employees . . . which would be proper under this legislation so long as they were based on those factors and not on the basis of whether employees are women or men."[89]

One such factor specifically mentioned was " . . . differentials in pay relating to insurance costs . . . ."[90]

Representative Thompson, the Chairman of the committee which reported on the Equal Pay Act, observed that: " . . . the language the gentlemen would add is redundant."[91]

Representative Pucinski asked whether the language referring to " 'a differential based on any other factor than sex' [would] really cover what the gentlemen from Illinois is trying to do?"[92]

Representative Thompson agreed it did[93] and thus, the Findley Amendment was rejected.

---

[88] 109 Cong. Rec. 9217 (1963).

[89] 109 Cong. Rec. 9206 (1963).

[90] *Id.*

[91] 109 Cong. Rec. 9217 (1963).

[92] *Id.*

[93] *Id.*

It is clear, therefore, that the fourth exception enumerated in the Equal Pay Act was not intended to be a mere redundancy. It was designed to make clear that neutral factors such as working time where statutes limited the number of hours a woman could work,[94] or life expectancy, even though linked with gender, were intended to be permitted under the Act.

Thus, regardless of whether the plan here at issue falls within the precise bounds of the equal payments rule as currently articulated by the Department of Labor, it is rooted in precisely the same actuarial approach which provides the legal and logical underpinning for that interpretation. As the dissenting opinion below noted, the Department of Labor "contemplate[d] the actuarial equivalent of the [petitioner's pension] scheme".[95]

IMPLICATIONS OF THE DECISION BELOW

The decision below, requiring that equal periodic pension benefits be given to male and female employees, will require radical changes in the pension and retirement coverage available to American workers, and may substantially increase pension costs.

In order to provide equal benefits, an employer with a defined payments plan presently in effect, will be faced with

[94] 109 Cong. Rec. 9205-06 (1963) (remarks of Representative Griffin).

[95] 553 F.2d at 597. Judge Kilkenny continued:

"In the context of pension plans, [the equal payments] rule makes sense only if it is read to impliedly authorize the funding of employee pension plans upon the basis of separate mortality tables. This regulatory justification for a plan with equal contributions and unequal benefits cannot be ignored in the variation before us." (*Id.*)

two choices: either to increase the amount of dollars contributed on behalf of female employees in order to fund the additional benefit payments, accumulating the funds in a "side pool" ("topping-up"); or to compute benefits on a "unisex" basis (*i.e.*, by reference to a mortality table based upon combined male and female experience).

The topping-up approach creates two problems. The first is the obvious fact that it requires that an employer pay an additional amount on behalf of female employees, thereby increasing the wages of the female employee above that of a similarly situated male. This would substantially add to the cost of pension coverage; on a nationwide basis, the additional costs have been estimated at $1.8 *billion* annually.[96]

Second, it would be necessary, under an equal benefits rule, to restructure the great majority of existing pension plans. Most plans offer various benefit options upon retirement in addition to a life annuity. If male and female employees must, for example, each receive equal amounts under a lump-sum option, then no female employee would ever select the lump-sum option unless the benefits payable under that option were also computed by

[96] In April 1976, the Federal Equal Employment Opportunity Coordinating Council formulated a proposal to require that equal pension benefits be paid to all female employees retiring after January 1, 1980. *See* BNA Daily Lab. Rep., No. 80, April 23, 1976 at A-12; *Id.*, No. 122, June 23, 1976 at A-16 to 17, E-1 to 3. In connection with this proposed bill, the Coordinating Council received a report by a task force of actuaries on the cost of equalizing pensions for men and women. Based upon actual payments into pension plans in 1976 in the aggregate amount of $60 billion and assuming a 3% increase (the figure apparently believed by the government to be the average cost to pension plan sponsors), this would result in additional pension costs of approximately $1.8 billion annually.

using female mortality rates. The added costs of providing the same benefits for male employeees would constitute a disincentive to employers in determining whether to establish or maintain pension coverage for their employees.

The alternative approach to "topping-up", computation of funding requirements based upon unisex actuarial tables, is no more satisfactory a solution. For existing plans this alternative would, of course, result in a reduction in benefits for males, which is not a practical solution for most employers, particularly where benefits have already vested or are collectively bargained.

Certain commentators have suggested that the use of unisex actuarial tables would satisfy both the requirements of Title VII and the actuarial necessity of a group basis for computing the level of required premiums. In fact, such tables violate the basic insurance concept that,

> "every insured should contribute his fair share toward the risk involved—that only applicants who are exposed to comparable degrees of risk should be placed in the same premium class." [97]

Equitable classification of risks requires not only that equal classes be treated equally, but also that unequal classes *not* be treated equally. Just as it would be inequitable to treat a 25-year old woman as a member of the same risk class as a 65-year old woman to compute life insurance or annuity premiums, similarly, a 25-year old male employee is in a different risk class than a 25-year old female. If this principle is not followed, then one class

[97] P. Shepherd & A. Webster, SELECTION OF RISKS 1 (1957). This principle is embodied in state insurance statutes. *See supra* n.65 and accompanying text.

will be forced to subsidize another. Use of unisex tables serves only to camouflage, not to eliminate, the subsidization.

To say that rates must be computed based upon combined male and female experience and that for male employees must pay additional insurance premiums for their pensions is analogous to the claim which was raised by the plaintiffs and rejected by this Court in *General Electric.* The district court there had found that, even if it were demonstrated that the actuarial value of the disability insurance coverage provided to male and female employees was identical,

> "such a finding would not . . . have justified the exclusion of pregnancy-related disabilities . . . . Regardless of whether the cost of including such benefits might make the Plan more costly for women than for men, the District Court determined that '[i]f Title VII intends to sexually equalize employment opportunity there must be this one exception to the cost differential defense.' " [98]

This Court, in no uncertain terms, declared:

> "[t]he District Court was wrong in assuming, as it did . . . that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.' " [99]

[98] *General Electric*, at 132 (citation omitted).

[99] *General Electric*, at 139 n.17 (citation omitted).

Moreover, rates computed on the basis of unisex mortality tables would be inherently unstable. An employer with a large number of males in his work force would be foolish to purchase annuities from an insurer required to compute rates based upon unisex experience. These rates would reflect the higher costs of providing pension payments to the female segment of the work force. Such an employer, if sufficiently large,[100] would self-insure by establishing a "trusteed" plan pursuant to which pension obligations would be funded based upon the plan's actual experience. Because of the particular composition of his predominantly male work force, this experience would be more favorable to the employer than the unisex rates offered by an insurer.

Those employers who continue to purchase pension coverage will be faced with the fact that the experience of the insurer will be weighted heavily toward the mortality experience previously shown as female experience in sex-segregated tables. As a matter of economics, the unisex rate inevitably would rise to reflect the insurer's claim costs. This, in turn, could be expected to induce additional groups to leave the plan until only those groups with the highest risk of loss would retain their coverage.[101] For the small

[100] Small pension plans do not normally have the option of self-insuring. If a small plan were to self-insure, it would expose itself to the risk that its participants would survive significantly longer than expected and the plan would cost significantly more than it would if insurance had been purchased—perhaps significantly more than the employer could pay.

[101] The history of the insurance industry discloses one prior attempt to disregard differences in risk classification, an attempt which resulted in failure. Certain assessment societies formed in the United States after the Civil War set equal premiums and assessments without regard to the age of the individual member. As the average age of the members increased, and mortality experience worsened, the frequency of assessments increased and the established associations were unable to attract the younger members necessary to keep down the level of necessary payments. Ultimately, the rates necessary to sustain the benefits payable to the older members became too heavy to be borne by the membership, and the associations terminated, leaving members without the protection for which they contributed over a period of a number of years. *See* Bailey, Hutchison & Narber, *The Regulatory Challenge to Life Insurance Classification*, 25 DRAKE L. REV. INS. L. ANN. 779, 784-85 (1976).

employer for whom the option of establishing and funding a trusteed plan is impractical, the logical result would be the elimination of the pension plan.

The use of unisex tables can be anticipated to result in increased costs of pensions. The same actuarial task force which considered the cost of requiring employers to provide equal benefits to male and female employees using the "topping-up" method, made note of the estimate of Teachers Insurance and Annuity Association, that use of a unisex table would result in an increase in contributions of approximately 7%,[102] or $4.2 billion annually.[103]

While the inequity of according similar treatment to dissimilar risks has already been described, one particular argument advanced by some proponents of unisex actuarial tables, such as Professor Barbara Bergmann, requires mention. Under what has become known as the "overlap theory", it has been argued[104] that it is possible to match approximately 83% of males and females as to years of death; that is, if a group of 100,000 males, age 65, and a group of 100,000 females, age 65, were used as a test sample, when all of the members of the group had died, it

[102] BNA Daily Lab. Rep., No. 122, June 23, 1976, at E-3.

[103] *See supra* n.94.

[104] *See* King, *Men, Women, and Life Annuities*, J. RISK & INS. 553, 556-57 and Myers, *Forum: Pension Benefits and Sex*, 9 CIVIL RIGHTS DIGEST 45-46 (1977) which describe and criticize a study by Professor Bergmann.

would be found that approximately 83,000 of the females had died at the same age as approximately 83,000 of the males. Thus, because 17% of the females live longer than a corresponding percentage of the males, it is supposedly unfair to penalize the other 83% of the females who can be paired with males as to age at death by charging females higher annuity premiums.

It should be noted at the outset that the Bergmann study arbitrarily selected as the basis for pairing males and females, the year of death. This is no more correct than pairing by one of the many other possible methods, such as by order of death. Thus, if the first woman who dies is paired against the first man who dies, and this process of consecutive pairing is followed, by the end of the third year no male will be matched against a female who died at the same age. In fact, continuing this process to age 110 for males and age 115 for females leads to pairings over most of the period with the male age at death being five years lower than the age at death of the "corresponding" female.

The logical fallacy and economic irrelevance of the "year of death pairing" approach is obvious when this is viewed in terms of actual dollars. If a company (or a government) were to issue annuities of $1,000 per year to each of 100,000 men and 100,000 women experiencing the mortality rates referred to in the Bergmann study, it would have to make payments of $100,000,000 in the first year to each group. In the fifth year the payments to the male annuitants would have dropped to $90,329,000, while those to the female annuitants would amount to $94,053,000, and in the tenth year annuity payments would have been $73,657,000 to males, and $83,328,000 to females. Over the course of fifty years, an aggregate of $1.561 billion would have been paid to male annuitants and $1.926 billion to females. The females, as a

group, would have received $365 million—23%—more than the males.[105]

Professor Robert J. Myers, formerly Chief Actuary for the Social Security Administration for 23 years, and Professor of Actuary Science at Temple University, criticized the overlap theory in a recent article in *Civil Rights Digest*,[106] a publication of the U.S. Commission on Civil Rights.

He noted that, while the years of death of 84% of men and women coincide, the 16% of unmatched men would have an average age at death of approximately 70 years, and the average age at death of the unmatched women would be approximately 88. He then illustrated the absurdity of the overlap analysis by observing that if the years of death of members of a group of 1,000 men at age 65 are matched with the years of death of a group of men aged 60, there will be an overlap of approximately 85%. Thus, under that theory, it presumably would be improper or unfair to utilize mortality tables based on age in setting insurance premiums. Of course, the logical result of following this mode of analysis is to dispense with any actuarial analysis at all; a result which, we submit, is neither desirable nor mandated by Title VII.

---

[105] Looked at from another perspective, if benefits of $1,000 per year were to be paid to each of 100,000 males beginning at age 65 from a fund earning 5% after taxes and all expenses, such a fund would have to be $1,040,000,000. The corresponding fund needed for female annuitants would amount to $1,194,000,000.

Alternatively, a fund equal to that used to provide $1,000 a month to male annuitants could provide $870 per month to female annuitants. If female annuitants were to draw $1,000 per month from this last fund rather than $870 per month, it would be exhausted after 18 years. For those females surviving beyond that period and receiving no further payments, the overlap theory would provide cold comfort.

[106] Myers, *supra* n.104.

CONCLUSION

This Court, on the basis of a general anti-discrimination statute, is being asked to set aside long-standing and accepted insurance and actuarial practices, the validity of which has been acknowledged by government and industry alike. This should be done only upon the strongest evidence that it was intended by Congress; evidence which is nowhere to be found in the record of this case.

The pension plan established by petitioner does no more than to recognize the undeniable actuarial truth that female employees, on the average, live longer than male employees of the same age. To require identical treatment would be fair to no one. Mr. Justice Frankfurter, in another context, observed that "[i]t was a wise man who said that there is no greater inequality than the equal treatment of unequals." [107] This surely is the case here.

Respectfully submitted,

EDWARD SILVER
LARRY M. LAVINSKY
STEPHEN E. TISMAN
300 Park Avenue
New York, New York 10022
Attorneys for the Amicus

Of Counsel:

PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022

WILLIAM B. HARMAN, JR.
Executive Vice President
American Council of Life Insurance
1850 K Street, N.W.
Washington, D.C. 20006

---

[107] *Dennis* v. *United States*, 339 U.S. 162, 184 (1950) (dissenting opinion).